STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA WINTERS-MOBLEY, Plaintiff-Appellee,	UNPUBLISHED May 23, 2006
v	No. 264692 Wayne Circuit Court
ROBERT LEIDHOLDT, Defendant-Appellant.	LC No. 04-415109-NO

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying defendant's motion for summary disposition under MCR 2.116(c)(10). We reverse and remand to the trial court for entry of judgment for defendant.

I. Facts

This cause of action arises out of plaintiff, Cynthia Winters-Mobley's slip and fall at the home of defendant Robert Leidholdt.[1] On February 2, 2003, at approximately 3:30 a.m., plaintiff was delivering the Detroit Free Press to the porch of defendant's home. As plaintiff crossed the driveway, she slipped on a patch of black ice and incurred a spiral fracture that required surgical intervention. Plaintiff filed a complaint for recovery of damages on May 19, 2004. The complaint alleges that her injuries were suffered as a result of defendant's negligence, specifically his failure to maintain and inspect his roof eaves, gutters and downspouts. Plaintiff was aware of the weather conditions the morning of the accident and testified that she put salt out on her own driveway. Defendant contends that the care exercised at her own home, and her ability to determine that a sheet of ice covered the driveway in question, is indicative of the fact that she knew of the open and obvious icy condition.

Defendant is an elderly man who is unable to participate in the daily maintenance of his home because of memory and dementia issues. Therefore, defendant's son, Mark, who resides in Westland, Michigan, assumed the responsibility of maintaining the home. In 1999, defendant

[1] Defendant Robert Leidholdt passed away on July 15, 2005.

put a new roof, gutters and downspouts on his home. At the time of the alleged slip and fall, these features were less than four years old.

Defendant filed a motion for summary disposition requesting that plaintiff's claims be dismissed. The circuit court denied the defendant's motion for summary disposition on the grounds that defendant "should have been aware" of the subject condition. This Court granted defendant's request for leave to appeal.

II. Standard of Review

The circuit court's denial of defendant's motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins,* 458 Mich 288, 294; 582 NW2d 776, reh den 459 Mich 1204; 615 NW2d 731 (1998), after rem 469 Mich 487; 672 NW2d 849 (2003).

III. Notice

The first issue is whether there is a genuine issue of material fact as to whether defendant had notice of the ice on his driveway. Plaintiff argues she was a business invitee because she was delivering the Detroit Free Press to defendant's home. A "possessor of land has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). A defendant is subject to liability for physical harm caused to invitees by a condition on the land only if defendant: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to such invitees; (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433; 542 NW2d 612 (1995). This duty is not absolute, *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990), and does not extend to open and obvious dangers. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

As the owner of the premises, defendant allegedly had a legal duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that he should have known the invitees will not discover, realize, or protect themselves against. Plaintiff alleges defendant should have known that the water from his "poorly maintained gutters and misdirected downspout" would create ice on his driveway. The gutters in question, however, were only four years old at the time of the accident. Furthermore, the plaintiff's testimony to the ice on her own driveway two hours before the incident indicates that she "realized the danger… and protected herself against" the treacherous weather conditions before the accident. *See Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433.

The black ice was not a condition that anyone had previously experienced at defendant's home. In fact, plaintiff delivered newspapers to the home for many years and testified she never had a problem with black ice conditions. Plaintiff fails to establish that the conditions of defendant's home caused the black ice conditions. "A property owner must take reasonable

measures within a reasonable period after the accumulation of snow and ice to diminish the risk of injury to an invitee." *See Mann v Shusteric Enterprises,* Inc, 470 Mich 320, 332; 683 NW2d 573 (2004). It cannot be inferred that defendant was on notice of the dangerous condition because it is not clear whether the condition was spontaneous or existed for a length of time. Plaintiff has not demonstrated that defendant failed to take remedial measures within a reasonable period – her expert stated that the ice could have formed as little as an hour before her accident. At 3:30 a.m., plaintiff was actually in the best position to assess the condition of the driveway because defendant was asleep.

IV. Open and Obvious

The next issue is whether the black ice was open and obvious such that defendant had a duty to protect plaintiff. Whether a danger is open and obvious depends upon whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it under casual inspection, or is so obvious that the invitee might reasonably be expected to discover it. *Joyce v Rubin,* 249 Mich App 231, 238; 642 NW2d 360 (2002); *Novotney v Burger King Corp* (*On Remand),* 198 Mich App 470, 485; 499 NW2d 379 (1993).

The question of whether black ice is an open and obvious danger was recently addressed in *Kenny v Kaatz Funeral Home, Inc,* 472 Mich 929; 697 NW2d 526 (2005 (*Kenny II*). In reversing this Court's decision in *Kenny v Kaatz Funeral Home, Inc,* 264 Mich App 99; 689 NW2d 737 (2004)(*Kenny I*), our Supreme Court ruled that black ice, by itself is an open and obvious condition for reasons stated in the dissenting opinion of *Kenny I.* Furthermore, this Court has recently gone a step further and found that as a matter of law even ice covered by snow is open and obvious. *Ververis v Hartfield Lanes (On Remand),* ___Mich App___;___NW2d ___ (2006). Here, we believe an average person of reasonable intelligence could easily observe the danger of slipping on the accumulated precipitation under the circumstances of this case. See *Joyce, supra* at 239-240.

We conclude that the trial court erred. The evidence presented established as a matter of law that the condition here was "open and obvious." From plaintiff's own testimony, and giving plaintiff the benefit of the doubt, reasonable minds could only find that a reasonably prudent person upon casual inspection would have appreciated the danger of ice on the driveway. *Kenny, supra* at 119-120 (Griffin, J., dissenting).

V. Special Aspects

Duty does not extend to dangers that are open and obvious, unless a special aspects exception is met. An owner's duty of care arises to protect invitees from harm in the event that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *See Kenny v Kaatz Funeral Home, Inc,* 264 Mich App 99; 689 NW2d 737 (2004) (Griffin, J, dissenting); *citing Lugo v Ameritech Corp, Inc,* 464 Mich 512, 517; 629 NW2d 384 (2001). An example of "special aspects" of the condition is something unusual about its character, location, or surrounding conditions that make the risk of harm unreasonable. *See Bertrand v Alan Ford, Inc,* 449 Mich 606, 614-617; 537 NW2d 185 (1995).

In this case, no special circumstances exist that would impose a duty upon the defendant to protect the plaintiff. In fact there is nothing "unusual" about ice accumulating on a driveway

in through the course of a winter evening in Michigan. Absent "special aspects", the hazards presented by ice and snow are generally open and obvious and do not require the defendant to warn or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002). Plaintiff stated that the "whole driveway was icy" upon casual inspection, "I could see when I got a chance to see, it was icy." Here, there are no special aspects of the ice that make the risk of harm unreasonably high. In *Lugo*, the Court noted that an "open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm." *Lugo, supra* at 518. In *Lugo*, the Court provided two examples of open and obvious conditions that are unreasonably dangerous: a condition creating a risk of death or serious harm such as a thirty-foot pit in a parking lot, or a condition that is unavoidable such as where the only route to exit a commercial building is covered in standing water. *Id.* at 518. The danger presented by the patch of ice in issue is not like either of these examples. See *id.* at 520 (observing "that typical open and obvious dangers ... do not give rise to these special aspects"). A fall on an ordinary driveway does not present an unusual risk of death or serious bodily harm.

For the foregoing reasons, the circuit court erred in denying defendant's request for summary disposition.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra